Determination

Application for authorisation

lodged by

eRx Script Exchange Pty Ltd

in respect of

a revenue sharing arrangement with IP MDS Pty Ltd

Date: 27 September 2017

Authorisation number: A91579

Commissioners: Schaper
Court
Featherston

Summary

The ACCC has decided to grant authorisation to eRx Script Exchange Pty Ltd to continue to give effect to a revenue sharing arrangement with IP MDS Pty Ltd (formerly MediSecure Pty Ltd) until 30 June 2020.

The revenue sharing arrangement has the purpose of allowing eRx to continue operating its prescription exchange system (which communicates electronic prescription information between doctors and pharmacies) interoperably with IP MDS Pty Ltd's prescription exchange system. This means that patients can go to any pharmacy to get medicine, regardless of which prescription exchange system the doctor used.

The ACCC originally authorised the revenue sharing arrangement in 2013. The revenue sharing arrangement has not changed since the original authorisation.

The application for authorisation

1. On 28 April 2017 eRx Script Exchange Pty Ltd (**eRx**) lodged an application (A91579) with the ACCC seeking authorisation to continue to give effect to its revenue sharing arrangement with IP MDS Pty Ltd (formerly MediSecure Pty Ltd) (**MDS**).

2. The ACCC originally granted authorisation to the revenue sharing arrangement on 7 March 2013.

3. At the time of lodging the current application, eRx also requested interim authorisation to enable it to continue to give effect to the revenue sharing arrangement beyond 30 June 2017 (when the ACCC's original authorisation of the arrangement expired). The ACCC granted interim authorisation on 7 June 2017. A copy of the ACCC's **interim authorisation decision** is available on the ACCC's website.

4. Authorisation is a transparent process where the ACCC may grant protection from legal action for conduct that might otherwise breach the *Competition and Consumer Act 2010* (**the Act**). In this case, eRx has sought authorisation for a revenue sharing arrangement between competing software providers because the arrangement might be a cartel provision or might have the purpose or effect of substantially lessening competition within the meaning of section 45 of the Act.

5. The ACCC may 'authorise' businesses to engage in anti-competitive conduct where it is satisfied that the public benefit from the conduct outweighs any public detriment. The ACCC conducts a public consultation process when it receives an application for authorisation.[1]

[1] Detailed information about the authorisation process is contained in the ACCC's Guide to Authorisation available on the ACCC's website **www.accc.gov.au**.

6. On 31 August 2017 the ACCC issued a draft determination[2] proposing to grant authorisation to eRx to continue to give effect to the revenue sharing arrangement until 30 June 2020. A conference was not requested to discuss the draft determination.

The conduct

7. eRx seeks authorisation to continue to give effect to a revenue sharing arrangement which underpins the operation of its electronic pharmaceutical prescription exchange system. The revenue sharing arrangement has the purpose of allowing eRx to continue operating its prescription exchange system interoperably with MDS' prescription exchange system.

8. **Prescription exchange systems** are computer systems, programs and equipment which communicate electronic prescription information between doctors and pharmacies. The prescription exchange system used by the doctor is called the **'originating PES'** and the prescription exchange system used at the pharmacy is called the **'dispensing PES'**. **Interoperability** allows electronic prescriptions to be accessed by all pharmacies, irrespective of which prescription exchange system was used by the doctor.

9. The revenue sharing arrangement for which authorisation is sought is set out in Clause 14 of a Commercial Interchange Agreement between eRx and MDS.[3] Clause 14 provides that eRx and MDS agree to share equally in the fee which is paid to the dispensing pharmacist by the Australian Government and in turn charged by the owner of the dispensing PES to that dispensing pharmacist for each prescription that originated on the prescription exchange system of the other party (the **'revenue sharing arrangement'**).

10. eRx submits that the aim of the revenue sharing arrangement is to eliminate any incentive which might otherwise exist for either service provider to hinder interoperability. That is, by seeking to ensure that prescriptions that originate on their system (used by a doctor) remain on their system at the point of dispensing in a pharmacy, which is where payments are made and received for the pharmaceuticals.[4]

11. eRx seeks authorisation to extend the operation of the revenue sharing arrangement until the Commercial Interchange Agreement is terminated, expires or is otherwise bought to an end, or until the relevant funding under the Sixth Community Pharmacy Agreement ends on 30 June 2020.[5]

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2 Subsection 90A(1) requires that before determining an application for authorisation the ACCC shall prepare a draft determination.

3 eRx supporting submission to the application for authorisation A91579, 28 April 2017, Annexure A.

4 eRx supporting submission to the application for authorisation A91579, 28 April 2017, Annexure C, p. 5.

5 eRx application for authorisation A91579, 28 April 2017, Form B, 2(d), p. 3.

Background

The parties

12. eRx and MDS operate the only two prescription exchange systems that currently exist in Australia.

13. **eRx,** established in 2009, is a wholly owned subsidiary of the Fred IT Group. In 2013, Telstra acquired 50 per cent of the Fred IT Group, which is also 50 per cent owned by the Pharmacy Guild of Australia.

14. **MDS** is a private Australian company, established in 2009. In 2016, MDS merged with Simple Retail, a pharmacy software company.

Prescription exchange systems – interoperability and funding

15. The Australian Government has been encouraging uptake of electronic prescriptions to improve healthcare outcomes, including by avoiding pharmacies having to re-key the information on prescriptions, which reduces the number of transcription errors. Prior to 2012, the uptake of electronic prescriptions was hampered because the existing prescription exchange systems were not interoperable.

16. With eRx and MDS owning the only two prescription exchange systems in Australia, agreement between the two parties (and the Australian Government, through the Department of Health) was necessary to allow electronic prescriptions to be put into one system and taken out of the other – where a doctor is signed up to one system and the patient goes to a pharmacy that is signed up to the other system.

17. As part of the Australian Government's Interoperability Project, electronic prescriptions can now be accessed by all pharmacies, no matter which prescription exchange system the prescription originated on.

18. The uptake and use of electronic prescriptions was originally a priority for the Australian Government under the Fifth Community Pharmacy Agreement (between the Australian Government and the Pharmacy Guild of Australia). eRx advises that it continues to be a priority under the Sixth Community Pharmacy Agreement, with funding of $12.7 million per year potentially continuing until 30 June 2020.[6]

19. The purpose of the funding is to assist pharmacies to offset some of the costs incurred through using prescription exchange systems. Currently, pharmacists receive $0.15 from the Australian Government for each eligible prescription downloaded by a prescription exchange system. A prescription exchange system owner then charges pharmacies based on the number of eligible electronic

[6] Ongoing funding for the life of the Sixth Community Pharmacy Agreement is subject to a cost effectiveness review – see eRx supporting submission to the application for authorisation A91579, 28 April 2017, Annexure B, *Sixth Community Pharmacy Agreement,* p.29.

prescriptions and repeats transferred through its service. Currently, pharmacies are charged $0.15 by the owner of the 'dispensing PES'.[7]

Previous ACCC authorisation (A91348)

20. On 7 March 2013 the ACCC granted authorisation to eRx to make and give effect to the revenue sharing arrangement with MediSecure (now MDS). This original authorisation expired on 30 June 2017. The parties continue to give effect to the revenue sharing arrangement beyond the expiry date under the interim authorisation granted by the ACCC on 7 June 2017.

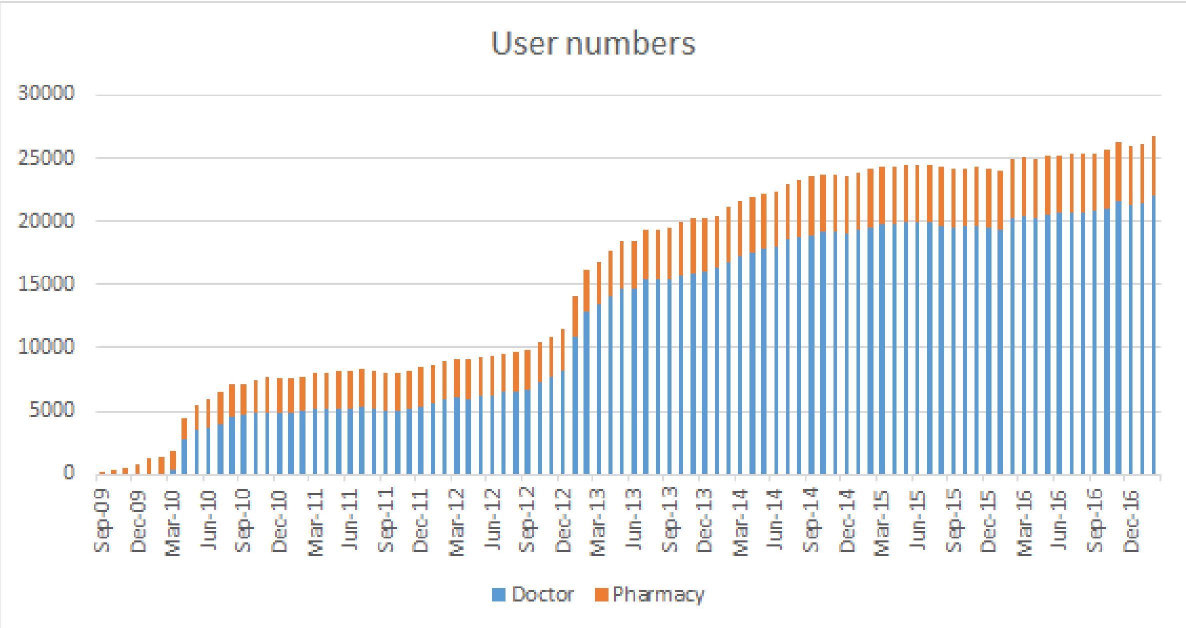
21. Further information about the ACCC's original assessment of the likely public benefits and public detriments from the revenue sharing arrangement is contained in the **2013 eRx authorisation decision**.

What's changed since the 2013 authorisation?

22. The parties have not changed the revenue sharing arrangement since it was previously authorised.

23. eRx submits the number of users of its prescription exchange system has increased significantly since the ACCC originally granted interim authorisation to the revenue sharing arrangements in December 2012 (see Figure 1). eRx advises that presently, around 90 per cent of pharmacies (out of approximately 5600 community pharmacies)[8] and 75 per cent of doctors use a prescription exchange system.[9]

Figure 1: number of users of eRx's prescription exchange system[10]



7 eRx supporting submission to the application for authorisation A91579, 28 April 2017, Annexure C, pp. 2-3.

8 Submission from Pharmacy Guild of Australia, 23 May 2017, p. 1.

9 eRx supporting submission to the application for authorisation A91579, 28 April 2017, Annexure C, p. 2.

10 Ibid, p. 4.

24. The ACCC understands that 'exchange level' interoperability between the two systems was achieved in December 2012, meaning that electronic prescriptions sent to one exchange can be downloaded by a pharmacy connected to the other exchange. However, the ACCC understands there is additional work for dispensing software vendors to do before full interoperability will occur.[11]

Submissions received by the ACCC

25. The ACCC tests the claims made by the applicant in support of an application for authorisation through an open and transparent public consultation process.

26. The ACCC sought submissions from several interested parties, including relevant industry associations and the Australian Government Department of Health (**Department of Health**). All submissions received by the ACCC supported eRx's application for authorisation.

27. An overview of the public submissions received from eRx and interested parties follows.

Prior to the draft determination

eRx

28. eRx submits that the continued operation of the revenue sharing arrangement supports the uptake of electronic prescriptions which leads to improved healthcare outcomes and quality use of medicines. For example, avoiding the need for pharmacists to re-key prescription information leads to a reduction in transcription errors. eRx considers there are no public detriments likely to result from the revenue sharing arrangement.

Interested parties

29. The ACCC received a public submission from the **Pharmacy Guild of Australia** (a part owner of eRx). It supports the continuation of the revenue sharing arrangement and believes that it facilitates the interoperability of the two prescription exchange systems, which results in significant public benefits (by promoting quality use of medicines through efficient and safe dispensing of medicines and generating large volumes of prescription information which is provided to the Australian Government's My Health Record).[12]

[11] eRx's website: http://www.erx.com.au/eprescribing/interoperability/ viewed 2 June 2017.

[12] Submission from The Pharmacy Guild of Australia, 23 May 2017, p. 1.

30. The **Department of Health** provided a letter of support attached to eRx's current application for authorisation, noting that the revenue sharing arrangements is 'essential to the ongoing progression and development of electronic prescribing.'[13] It also submits that:

> Interoperability between the two systems continues to be in the public interest as it enables patient choice of pharmacy and facilitates efficiencies through widespread use of electronic prescriptions in pharmacies. Continuation of interoperability between the two Prescription Exchange Services also allows continued improvement of Australian medication management systems, better enables the Quality Use of Medicines initiative under the National Medicines Policy and contributes to the broader digital health agenda.[14]

Following the draft determination

31. A pre-decision conference was not requested and the ACCC did not receive any further submissions in response to the draft determination.

32. Copies of public submissions may be obtained from the ACCC's website **www.accc.gov.au/authorisationsregister.**

ACCC evaluation

33. The ACCC's evaluation of the revenue sharing arrangement is in accordance with the relevant net public benefit tests[15] contained in the Act.

34. In broad terms, the ACCC shall not grant authorisation unless it is satisfied that the likely benefit to the public from the conduct or arrangement would outweigh the likely detriment to the public constituted by any lessening of competition.

35. To assist the ACCC's assessment of the conduct against the net public benefit test, the ACCC identifies the relevant **area of competition** and compares the benefits and detriments likely to arise in the **future with the conduct** for which authorisation is sought against those in the **future if the conduct did not occur**.

36. The Commercial Interchange Agreement between eRx and MDS affects the supply of pharmaceutical prescription exchange software to Australian community pharmacies and doctors. eRx and MDS are currently the only suppliers of this software in Australia. The ACCC understands that no new providers of prescription exchange software are looking to commence supply in the short term.

37. eRx advises that the Commercial Interchange Agreement, underpinning interoperability of the two prescription exchange systems, would automatically terminate if the revenue sharing arrangement was not authorised.[16]

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13 eRx supporting submission to the application for authorisation A91579, 28 April 2017, *letter of support from the Australian Government Department of Health (dated 20 April 2017),* p. *2.*

14 Ibid*,* p. 1.

15 Subsections 90(7) and 90(5B) of the Act.

16 eRx covering letter to application for authorisation A91579, 28 April 2017, p. 2.

38. In assessing the likely impact of the revenue sharing arrangement between eRx and MDS, the ACCC has taken into account:

- without authorisation of the revenue sharing arrangement, the Commercial Interchange Agreement underpinning the interoperability of the two prescription exchange systems would cease, which could have an adverse impact on the operation and use of electronic prescriptions within community pharmacies across Australia and

- in the future where the revenue sharing arrangement occurs, the two prescription exchange systems would continue to operate interoperably, meaning electronic prescriptions would be able to be accessed by all pharmacies, no matter which prescription exchange system the doctor used to write the prescription.

Public benefits

39. Public benefit is not defined in the Act. However, the Tribunal has stated that the term should be given its widest possible meaning. In particular, it includes:

> …anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements … the achievement of the economic goals of efficiency and progress.[17]

40. In its 2013 authorisation, the ACCC concluded that the revenue sharing arrangement would facilitate the timely implementation of interoperability of the two prescription exchange systems. In turn, this was likely to increase the uptake and use of electronic prescriptions and result in the following public benefits:

- a reduction in transcription and interpretation errors (which reduces the potential for patients to receive the wrong medicine)

- increased efficiencies for pharmacies in dispensing prescriptions and

- greater convenience for patients by being able to access electronic prescription services at more pharmacies.

41. Since the revenue sharing arrangement commenced, the ACCC notes the use of electronic prescriptions has increased. eRx advises that around 75 per cent of doctors and 90 per cent of community pharmacies now use a prescription exchange system.

42. The ACCC considers the continuation of the revenue sharing arrangement, which underpins the interoperability of the two prescription exchange systems, will facilitate the ongoing development and growth in the use of electronic prescriptions by doctors and pharmacies. Flowing from this, the ACCC considers that the revenue sharing arrangement is likely to continue to result in the public benefits identified and accepted in 2013.

[17] *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,677. See also *Queensland Co-operative Milling Association Ltd* (1976) ATPR 40-012 at 17,242.

Public detriment

43. Public detriment is also not defined in the Act but the Tribunal has given the concept a wide ambit, including:

> …any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.[18]

44. eRx submits there are no public detriments generated by the revenue sharing arrangement for the following reasons:[19]

- it is not aware of any new providers who are developing or considering developing a prescription exchange system and
- in any event, the Commercial Interchange Agreement states that eRx and MDS are free to enter into similar interchange agreements with any business that develops a new prescription exchange system and permitted to commercialise the use of the prescription exchange system by the Australian Government.

45. While the revenue sharing arrangement may reduce the degree of competition between eRx and MDS to some extent, the ACCC considers the arrangement is likely to result in minimal, if any, public detriment. In reaching this conclusion, the ACCC has taken into account:

- the relatively short period of authorisation sought – eRx seeks to extend the operation of the revenue sharing arrangement for a further three years while government funding to support the ongoing uptake of electronic prescriptions under the Sixth Community Pharmacy Agreement continues
- given the agreement to share the government prescription fee is only relevant when a script originates on the software owned by the other party, eRx and MDS will still compete to supply their prescription exchange systems to pharmacies and doctors and
- the continued operation of the revenue sharing arrangement is unlikely to prevent or deter new providers of prescription exchange systems from entering the market in the short term. If a new entrant emerged, the parties have indicated that they are willing to negotiate to extend the arrangements to the new entrant as well.

46. The ACCC considers that if eRx and MDS did not extend the Commercial Interchange Agreement, which includes the revenue sharing arrangement for which authorisation is sought, to a prospective new supplier of pharmaceutical prescription exchange software, this would be a material change in circumstances. This would be grounds for the ACCC to review the authorisation.

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18 *Re 7-Eleven Stores* (1994) ATPR 41-357 at 42,683.

19 eRx supporting submission to the application for authorisation A91579, 28 April 20017, Annexure C, p. 5.

Balance of public benefit and detriment

47. In general, the ACCC may grant authorisation if it is satisfied that, in all the circumstances, the revenue sharing arrangement is likely to result in a public benefit, and that public benefit will outweigh any public detriment, including any lessening of competition, likely to arise from the arrangement.

48. The ACCC is satisfied that enabling eRx and MDS to continue to give effect to the revenue sharing arrangement is likely to result in the following public benefits:

    - a reduction in transcription and interpretation errors of medical prescriptions
    - increased efficiencies for pharmacies in dispensing prescriptions and
    - greater convenience for patients by being able to access electronic prescription services at more pharmacies.

49. The ACCC considers these significant public benefits outweigh the minimal, if any, detriment to the public, including any lessening of competition, likely to result from the revenue sharing arrangement.

50. Accordingly, the ACCC is satisfied that the relevant net public benefit tests are met and grants authorisation.

Length of authorisation

51. The Act allows the ACCC to grant authorisation for a limited period of time.[20] This allows the ACCC to be in a position to be satisfied that the likely public benefit will outweigh the public detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

52. In this instance, eRx sought authorisation to continue to give effect to the revenue sharing arrangement for three more years until 30 June 2020, being when Australian Government funding under the Sixth Community Pharmacy Agreement ends.

53. The ACCC considers the proposed period of authorisation is appropriate, and grants authorisation until 30 June 2020.

[20] Subsection 91(1) of the Act.

Determination

The application

54. On 28 April 2017 eRx Script Exchange Pty Ltd (**eRx)** lodged application for authorisation A91579 with the ACCC. Application A91579 was made using Form B, Schedule 1, of the Competition and Consumer Regulations 2010*.* The application was made under subsections 88(1) and 88(1A) of the *Competition and Consumer Act (2010)* (**the Act**) to:

> continue to give effect to a revenue sharing arrangement (outlined at Clause 14 of a Commercial Interchange Agreement) which has the purpose of allowing eRx to continue operating its prescription exchange system interoperably with IP MDS Pty Ltd's (formerly MediSecure Pty Ltd) (**MDS**) prescription exchange system and share the fee that is paid to the dispensing pharmacist by the Australian Government under the Sixth Community Pharmacy Agreement, and in turn charged by the dispensing prescription exchange system provider to the dispensing pharmacist, for each prescription that originated on the prescription exchange system of the other party (the **'revenue sharing arrangement'**).

The net public benefit test

55. For the reasons outlined in this determination, the ACCC considers that in all the circumstances the revenue sharing arrangement for which authorisation is sought is likely to result in a public benefit that would outweigh the detriment to the public constituted by any lessening of competition.[21]

56. Therefore, the ACCC grants authorisation to application A91579.

Conduct which the ACCC proposes to authorise

57. Authorisation extends to eRx to continue to give effect to the revenue sharing arrangement with MDS until 30 June 2020.

Interim authorisation

58. At the time of lodging the application, eRx requested interim authorisation to enable it to continue to give effect to the revenue sharing arrangement beyond 30 June 2017 (when the previous authorisation of the arrangement expired). The ACCC granted interim authorisation under section 91(2) of the Act on 7 June 2017.

59. Interim authorisation will remain in place until the date the ACCC's final determination comes into effect or until the ACCC decides to revoke interim authorisation.

Date authorisation comes into effect

60. This determination is made on 27 September 2017. If no application for review of the determination is made to the Australian Competition Tribunal, it will come into force on 19 October 2017.

[21] In accordance with subsections 90(7) and 90(5B) of the Act.